Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-Peguam Muslim Malaysia, intervener) and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL REFERENCE NOS 06(f)-1–01 OF 2018(W) AND 06(f)-5–02 OF 2018(Q)
HASAN LAH, ZAINUN ALI, RAMLY ALI, BALIA YUSOF, AZIAH ALI AND ALIZATUL KHAIR FCJJ
24 SEPTEMBER 2018

Constitutional Law — Judges — Appointment — Appointment of judges as Chief Justice of Malaysia and President of Court of Appeal after mandatory retirement — Whether participation in coram in conflict due to appointment as Chief Judge of Malaya — Whether matter became academic — Whether exception applied — Courts of Judicature Act 1964 s 84

These references of constitutional questions raised the issue of whether the appointments of the second and the third respondents as the Chief Justice of Malaysia and the President of the Court of Appeal respectively, after their mandatory retirements, were valid and constitutional. The applicant filed an originating summons at Kuala Lumpur High Court to challenge the constitutionality of the two appointments. The originating summons was followed by an application under s 84 of the Courts of Judicature Act 1964 and art 128(2) of the Federal Constitution to refer a series of constitutional questions that arose from the originating summons to the Federal Court for determination. The Advocates Association of Sarawak through its president filed a similar action in an originating summons at Kuching High Court. Both the High Courts referred the constitutional questions to this court for determination. The coram was made up of, inter alia, Justice Zaharah Ibrahim. Subsequent to the hearing, by reason of the General Election there was a change in government. The second and third respondents issued their letters of resignation and the Yang di-Pertuan Agong consented to their letters. The government announced the appointment of, inter alia, Justice Zaharah Ibrahim as the new Chief Judge of Malaya. Thus, this court fixed a constitutional reference for clarification.

Held, dismissing the references:

(1) The public perception was that the early resignation of the second and third respondents was inextricably intertwined with this case. As a consequence of their resignations, Justice Zaharah Ibrahim who was in the coram, had since been appointed the Chief Judge of Malaya. Bearing in mind the overriding consideration of public confidence in the

administration of justice, the impugned judge was placed in a position of conflict. The involvement of the impugned judge raised a public perception problem. Right-minded people 'might go away thinking that the court was biased, not on account of the actual decision, but on account of who made the decision (the impugned judge)'. The promise of impartiality in the judiciary could not build public faith in the courts; only actual impartiality could accomplish that goal. In this light, the position, taken by the applicants that they find no conflict vis a vis the appointment of the impugned judge sitting in this coram was disquieting to say the least (see paras 39 & 45–46).

(2) In view of the fundamental changes in the governance of the judiciary with the departure of the second and third respondents, the stark issues had become blunted by consequential events. The illegality alleged had been superseded by subsequent events. As such, the subject matter of the dispute — the constitutionality of the judges holding their respective offices was no longer in existence. Their replacements had been made. The outcome of the constitutional reference would not affect the positions of the parties at all. In other words, there was no remedy that this court could order, to give effect to the applicant's view on the constitutionality of the appointments (see paras 53–55).

(3) This case clearly did not appear to fall within the *R v Secretary of State for the Home Department, ex p Salem* [1999] AC 450 exception for public law matters. The issues in the motion were academic and that a judgment need not be issued by this court. Both second and third respondents had since relinquished their post. And since matters had changed irrevocably by reason of their resignation, it was no longer tenable for the court to answer the question posed because the factual substratum underlying the question posed no longer existed. In this, the court declined to issue a judgment for there was no issue to be decided. The applicants had nothing to fight for, because they had already achieved their purpose (see paras 61, 63, 65 & 67).

[Bahasa Malaysia summary

Rujukan persoalan perlembagaan ini menimbulkan isu sama ada pelantikan responden kedua dan ketiga sebagai Ketua Hakim Negara dan Presiden Mahkamah Rayuan masing-masing, setelah persaraan mandatori, adalah sah dan berperlembagaan. Pemohon mengemukakan saman pemula di Mahkamah Tinggi Kuala Lumpur untuk mencabar keperlembagaan kedua-dua pelantikan itu. Saman pemula diikuti oleh permohonan di bawah s 84 Akta Mahkamah Kehakiman 1964 dan perkara 128(2) Perlembagaan Persekutuan untuk merujuk serangkaian persoalan perlembagaan yang timbul dari saman pemula ke Mahkamah Persekutuan untuk ditentukan. Persatuan Peguambela Sarawak melalui presidennya memfailkan tindakan serupa dalam saman pemula di Mahkamah Tinggi Kuching. Kedua-dua Mahkamah Tinggi

menyerahkan persoalan perlembagaan ke mahkamah ini untuk ditentukan. Koram itu terdiri, antara lain, Hakim Zaharah Ibrahim. Setelah pendengaran, oleh sebab Pilihan Raya Umum terjadi perubahan dalam kerajaan. Responden kedua dan ketiga mengeluarkan surat peletakan jawatan mereka dan Yang di-Pertuan Agong bersetuju dengan surat mereka. Kerajaan mengumumkan pelantikan, antara lain, Hakim Zaharah Ibrahim sebagai Ketua Hakim Malaya yang baru. Oleh itu, mahkamah ini menetapkan rujukan perlembagaan untuk penjelasan.

Diputuskan, menolak rujukan:

(1) Persepsi awam adalah bahawa pengunduran awal responden kedua dan ketiga saling berkaitan dengan kes ini. Akibat pengunduran mereka, Hakim Zaharah Ibrahim yang berada di koram, sejak itu dilantik sebagai Ketua Hakim Malaya. Mengambil kira pertimbangan utama kepercayaan awam terhadap pemerintahan keadilan, hakim yang dipersoalkan ditempatkan dalam posisi konflik. Penglibatan hakim yang dipersoalkan menimbulkan masalah persepsi awam. Orang yang berfikiran betul 'mungkin akan pergi dengan berfikir bahawa mahkamah itu berat sebelah, bukan kerana keputusan sebenarnya, tetapi kerana siapa yang membuat keputusan itu (hakim yang dipersoalkan)'. Janji tidak memihak dalam badan kehakiman tidak dapat membangunkan kepercayaan masyarakat di mahkamah; hanya ketidakberpihakan yang sebenarnya dapat mencapai tujuan tersebut. Dalam hal ini, kedudukan yang diambil oleh pemohon bahawa mereka tidak menemukan konflik dalam hal pelantikan hakim yang bersidang di koram ini adalah membimbangkan (lihat perenggan 39 & 45–46).

(2) Dengan perubahan utama dalam pemerintahan kehakiman dengan pemergian responden kedua dan ketiga, isu-isu jelas telah dilemahkan akibat peristiwa tersebut. Ketidaksahihan yang didakwa telah digantikan oleh peristiwa berikutnya. Oleh yang demikian, perkara pertikaian hakim yang memegang jawatan masing-masing sudah tiada. Penggantian mereka telah dibuat. Hasil rujukan perlembagaan sama sekali tidak akan mempengaruhi kedudukan pihak. Dengan kata lain, tiada remedi yang boleh diperintahkan oleh mahkamah ini, untuk memberi kesan kepada pandangan pemohon mengenai keperlembagaan pelantikan tersebut (lihat perenggan 53–55).

(3) Kes ini jelas tidak termasuk dalam *R v Secretary of State for the Home Department, ex p Salem* [1999] AC 450 pengecualian untuk perkara undang-undang awam. Isu-isu dalam usul itu adalah akademik dan keputusan tidak perlu dikeluarkan oleh mahkamah ini. Kedua-dua responden kedua dan ketiga telah melepaskan jawatan mereka. Dan kerana perkara-perkara telah berubah secara muktamad oleh kerana pengunduran mereka, mahkamah tidak lagi dapat menjawab pertanyaan

yang diajukan kerana substratum faktual yang mendasari persoalan yang diajukan tidak lagi ada. Dalam hal ini, mahkamah menolak untuk mengeluarkan keputusan kerana tiada isu untuk diputuskan. Pemohon tidak mempunyai apa-apa pertikaian, kerana mereka telah mencapai tujuan mereka (lihat perenggan 61, 63, 65 & 67).]

Cases referred to

Ainsbury v Millington [1987] 1 All ER 929, HL (refd)
Bhewa and Another v Government of Mauritius and Another [1992] Lexis Citation 3959, PC (folld)
Cesan v R; Mas Rivadavia v R (2008) 236 CLR 358, HC (refd)
Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another appeal [1998] 2 MLJ 137, CA (refd)
Dimes v Properties of Grand Junction Canal (1852) 3 HL Cas 759, HL (refd)
Gillies v Secretary of State for Work and Pensions [2006] 1 All ER 731; [2006] UKHL 2, HL (refd)
HM Attorney General v Scriven [2000] Lexis Citation 5132, QBD (refd)
Lawal v Northern Spirit Ltd [2004] 1 All ER 187; [2003] ICR 856, HL (refd)
Macnaughton v Macnaughton's Trustees 1953 SC 387 (refd)
Meerabux v Attorney General of Belize [2005] 2 AC 513, PC (refd)
Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113, FC (refd)
Metropolitan Properties Co (FGC) Ltd v Lannon and Others [1968] 3 All ER 304, CA (refd)
Porter v Magill [2002] 2 AC 357, HL (refd)
R v Altrincham Justices, ex p Pennington [1975] QB 549, QBD (refd)
R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2) [2000] 1 AC 119, HL (refd)
R v Gough [1993] AC 646, HL (refd)
R v Rand (1866) LR 1 QB 230, QBD (refd)
R v Secretary of State for the Home Department, ex p Salem [1999] AC 450, HL (distd)
R v Sussex Justices, ex p McCarthy [1924] 1 KB 256, KBD (refd)
Regina (Rusbridger and another) v Attorney General [2004] 1 AC 357, HL (refd)
Sun Life Assurance of Canada v Jervis [1944] AC 111, HL (refd)
United States v Balistrieri 779 F 2d 1191 (refd)

Legislation referred to

Courts of Judicature Act 1984 s 84
Federal Constitution arts 122(1), (1A), 122B(1), (2), 125(1), 128(2)

Hasan Lah FCJ:

INTRODUCTION

[1] These references of constitutional questions under s 84 of the Courts of Judicature 1964 raise the issue of whether the appointments of the second respondent and the third respondent as the Chief Justice of Malaysia and the President of the Court of Appeal respectively, after their mandatory retirements, are valid and constitutional.

[2] In Civil Reference No 06–01 of 2018(W), the applicant is the Bar Council who represents the advocate and solicitors in West Malaysia. In Civil Reference No 06(f)-5–02 of 2018(Q), the applicant, the President of the Advocates Association of Sarawak, represents the advocates in Sarawak.

[3] Pursuant to an Order of the High Court at Kuching dated 23 March 2018, inter alia, the Sabah Law Society was permitted to appear as amicus curiae at the hearing of the Reference No 06–5–02 of 2018(Q). Motion for intervener was filed on 13 December 2017 by the Muslim Lawyers Association in the suit filed by the Bar Council. Leave to intervene was allowed by the High Court at Kuala Lumpur.

[4] Both the High Courts referred the following constitutional questions to this court for determination:

(a) whether under art 122(1A) of the Federal Constitution an additional judge can be appointed on the advice of the Chief Justice, which advice is to take effect after the latter's retirement?

(b) whether under art 122(1A) read together with arts 122B(1), 122B(2) and 125(1) of the Federal Constitution an additional judge can be appointed as the Chief Justice or the President of the Court of Appeal?

(c) whether the appointment of judges by the Yang di-Pertuan Agong under arts 122(1A) and 122B(1) of the Federal Constitution is justiciable?

(d) whether the appointment of additional judges and thereafter of the Chief Justice and the President of the Court of Appeal announced whilst they were serving judges but to take effect after retirement violates arts 122(1), 122(1A) and 125(1) of the Federal Constitution? and

(e) it is instructive to indicate at this point that the coram was made up of Justice Hasan Lah, Justice Zainun Ali, Justice Zaharah Ibrahim, Justice Ramly Ali, Justice Balia Yusof, Justice Aziah Ali and Justice Alizatul Khair.

This coram was empanelled by the then Chief Judge of Malaya, Justice Ahmad Maarop.

[5] We heard the arguments of parties on 14 March 2018 and reserved our judgment.

BACKGROUND FACTS

[6] The facts are not in dispute. The applicants actions were based on the following media statement dated 7 July 2017, issued by the Prime Minister's Office:

> MEDIA STATEMENT
>
> APPOINTMENT OF THE CHIEF JUSTICE AND THE PRESIDENT OF THE COURT OF APPEAL, MALAYSIA WHO ARE APPOINTED AS ADDITIONAL JUDGES IN THE FEDERAL COURT PURSUANT TO ARTICLE 122(1A) OF THE FEDERAL CONSTITUTION
>
> Pursuant to Article 122B(1) of the Federal Constitution, His Majesty the Yang di-Pertuan Agong, on the advice of the Prime Minister and after consultation with the Conference of Rulers convened on the 24th and 25th of May 2017, is pleased to announce the following:-
>
> (i) YAA Tan Sri Dato' Seri Md Raus bin Sharif who has been appointed as an additional judge in the Federal Court for a period of 3 years commencing from 4th of August 2017 pursuant to Article 122(1A) of the Federal Constitution, to continue holding the positions of the Chief Justice of the Federal Court from the date and for the same period; and
>
> (ii) YAA Tan Sri Dato' Seri Zulkefli bin Ahmad Makinudin who was appointed as an additional judge for the Federal Court for a period of 2 years commencing from 28th September 2017 pursuant to Article 122(1A) of the Federal Constitution, to continue holding the position of the President of the Court of Appeal from the date and for the same period.
>
> 2. The appointment of YAA Tan Sri Dato' Seri Md Raus bin Sharif and YAA Tan Sri Dato' Seri Zulkefli bin Ahmad Makinudin as additional judges in the Federal Court after each of them had reached the age of 66 years and 6 months was premised on the proposal and advice of the then Chief Justice at the material time, YAA Tun Dato' Seri Arifin bin Zakaria (the First Respondent) to His Majesty the Yang di-Pertuan Agong on the 30th March 2017 ie before His Lordship retired.

[7] The second respondent attained the age of 66 years and six months on 3 August 2017. He was at that time the Chief Justice of the Federal Court. He was then appointed as an additional judge of the Federal Court on 4 August 2017 and on the same day appointed as Chief Justice of the Federal Court for a period of three years.

[8] The third respondent attained the age of 66 years and six months on 27 September 2017. He was at the same time the President of the Court of Appeal. He was then appointed as an additional judge of the Federal Court on 28 September 2017 and on the same day appointed as President of the Court of Appeal for a period of two years.

[9] Subsequently, at an Extraordinary General Meeting of the Bar Council on 3 August 2017, it was resolved, amongst others, that legal proceedings be instituted by the Bar Council to challenge the constitutionality of the appointments of the second and third respondents as Chief Justice of the Federal Court and President of the Court of Appeal respectively.

[10] On 10 October 2017, the Bar Council filed Originating Summons No WA-24–51–10 of 2017 to challenge the constitutionality of the two appointments.

[11] The originating summons was followed by an application under s 84 of the Courts of Judicature Act 1964 and art 128(2) of the Federal Constitution to refer a series of constitutional questions that arose from the originating summons to the Federal Court for determination.

[12] On 19 December 2017, the High Court of Kuala Lumpur referred the constitutional questions set out at para 4 above to this court for determination.

[13] On 27 December 2017, the Advocates Association of Sarawak through its President, Mr Ranbir Singh Sangha, filed a similar action in Originating Summons No KCH-24–124/12 of 2017 at Kuching High Court.

[14] Pursuant to an order of the Kuching High Court dated 29 January 2018, the same four questions were referred to this court for determination.

THE RELEVANT CONSTITUTIONAL PROVISIONS

[15] For ease of reference, we reproduced the relevant provisions of the Federal Constitution which have been referred to by the parties in their arguments and submissions and are required to be referred to in this judgment:

> 122 Constitution of Federal Court
>
> (1) The Federal Court shall consist of a president of the Court (to be styled 'the Chief Justice of the Federal Court'), of the President of the Court of Appeal, of the Chief Judges of the High Courts and until the Yang di-Pertuan Agong by order otherwise proves, of four other judges and such additional judges as may be appointed to Clause (1A).
>
> (1A) Notwithstanding anything in this Constitution contained the Yang di-Pertuan

Agong acting on the advice of the Chief Justice of Federal Court may appoint for such purpose or for such period of time as he may specify any person who has held high judicial office in Malaysia to be an additional judge of the Federal Court.

Provided that no such additional judge shall be ineligible to hold office by reason of having attained the age of sixty-six years.

...

122B Appointment of judges of Federal Court, Court of Appeal and High Courts

(1) The Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the Hog Courts and (subject to Article 122C) the other judges of the Federal Court, of the Yang di-Pertuan Agong, acting on the advice of the Prime Minister, after consulting the Conference of Rulers.

(2) Before tendering his advice as to the appointment under Clause (1) of a judge other than the Chief Justice of the Federal Court, the Prime Minister shall consults the Chief Justice.

...

125 Tenure of office and remuneration of judges of Federal Court

(1) Subject to the provisions of Clauses (2) to (5), a judge of the Federal Court shall hold office until he attains the age of sixty-six years or such later time, not being after than six months after he attains that age, as the Yang di-Pertuan Agong may approve.

IN THE FEW WEEKS THAT FOLLOWED

[16] Subsequent to the hearing, by reason of the General Election held on 9 May 2018 there was a change in government. By letter dated 7 June 2018, the second respondent and the third respondent, issued letters of resignation.

By letter dated 11 June 2018, the Yang di-Pertuan Agong (the King) consented to their respective letters as above mentioned.

[17] Soon after, ie on 11 July, the Government announced the simultaneous appointments of the Rt Honourable Justice Richard Malanjum as the new Chief Justice (CJ), replacing the second respondent; Justice Ahmad Maarop as the new President of the Court of Appeal (PCA) replacing the third respondent; Justice Zaharah Ibrahim as the new Chief Judge of Malaya (CJM) (replacing Justice Ahmad Maarop) and Justice David Wong Dak Wah as the new Chief Judge Sabah and Sarawak (CJSS) to replace Justice Richard Malanjum, the erstwhile CJSS.

[18] Thus on 13 September 2018, this court fixed a constitutional reference for clarification. We invited all parties to submit whether there is any change in the stance of parties following from the aforesaid development in particular:

A (a) whether the matter has been rendered academic; and

(b) whether Her Ladyship YAA Tan Sri Zaharah bt Ibrahim's participation in the coram is in conflict, due to her appointment as the Chief Judge of Malaya (CJM).

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[19] We heard all parties on 13 September 2018 on the points for clarification. Council for the Malaysian Bar submitted that the matter is not academic and that the declarations sought concern a 'live' issue, which necessitates a judgment. In respect of Her Ladyship YAA Tan Sri Zaharah bt Ibrahim's participation in the coram, it was submitted that Her Ladyship is not C in conflict, as Her Ladyship's appointment as the Chief Judge of Malaya took place after both the second and third respondents had resigned from their respective positions. The Advocates Association of Sarawak, Sabah Law Society (amicus curiae, Prime Minister Tun Mahathir Mohamad (watching brief by Encik Haniff Khatri) and Persatuan Peguam-Peguam Muslim Malaysia D (intervener) adopted the Malaysian Bar's stand.

[20] However, senior federal counsel Suzana Atan of the attorney general's chambers (AGC) argued that there is no necessity for the Federal Court to E deliver a judgment, since the second and third respondents have both relinquished their respective positions. The AGC also took the position that Her Ladyship YAA Tan Sri Zaharah bt Ibrahim is in a position of conflict, due to her appointment as Chief Judge of Malaya (CJM).

F **[21]** We then adjourned the matter for deliberation on the points submitted. For a structured argument to ensue, we will deal firstly with the second point for clarification, ie whether — Her Ladyship YAA Tan Sri Zaharah bt Ibrahim's participation in the coram is in conflict due to her appointment as the Chief Judge of Malaya (CJM).

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POSITION OF CONFLICT

[22] In so far as we are concerned, the appointments of the top four positions in the Judiciary are consequential. However the appointment of Justice H Zaharah bt Ibrahim as CJM appears to be open to a challenge of bias, whether perceived or actual. The historical underpinning of the idea that judges must not only avoid actual bias but also avoid the appearance of bias, is no more truer than the position found in this case.

I **[23]** The rule against bias, a pillar of the common law's quest for judicial impartiality seeks to ensure 'that justice is done and 'seen' to be done.' The applicable principles and standards are clear. As case laws have shown, the debates tend to revolve around their proper application to specific factual situation. The rule disqualifies judges from sitting in cases wherein they have an

interest, or where their impartiality might reasonably be questioned, or where there is, a 'real possibility' or 'reasonable apprehension' or 'reasonable suspicion' of bias. The standard is objective.

GENERAL PRINCIPLES OF BIAS

[24] The guiding principle is, no man shall be a judge in his own cause: *nemo judex in causa sua*. This principle is applied much more widely than the literal interpretation of the words might suggest (*R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119 at p 140, per Lord Hope).

[25] The overriding consideration is 'that there should be confidence in the integrity of the administration of justice (*R v Gough* [1993] AC 646 at p 659). It is with this consideration in mind that Lord Hewart CJ pronounced the immortal words in *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256 at p 259:

> ... *it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done*. The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. *Nothing is to be done which creates even a suspicion that here has been an improper interference with the course of justice.*

[26] The fundamental principle gives rise to two implications. First, if a judge is a party to the litigation or has an interest in its outcome, he is indeed sitting as a judge in his own cause and is automatically disqualified. Second, if the judge does not have a direct interest but his conduct gives rise to a suspicion that he is not impartial, he may be regarded as providing a benefit for another, by failing to be impartial (*Pinochet (No 2)* at pp 132–133, per Lord Brown-Wilkinson). These two categories will be considered in turn.

FIRST CATEGORY: DIRECT INTEREST

[27] The maxim that no man is to be a judge in his own cause is 'not confined to a cause in which he is a party, but applies to a cause in which he has an interest' (*Dimes v Properties of Grand Junction Canal* (1852) 3 HL Cas 759 at p 793, per Lord Campbell).

[28] The first category includes circumstances where a person acting in a judicial capacity has a direct interest in the outcome of the proceedings. In such cases, 'the nature of the interest is such that public confidence in the

A administration of justice requires that this decision should not stand'. It is irrelevant that there was in fact, no bias; it is also unnecessary to inquire whether there was a real likelihood of bias. The person is automatically disqualified (*R v Gough* at 661, 664 per Lord Goff).

B **[29]** It was once thought that the disqualifying interest is there must be 'any direct pecuniary interest,' however small, in the subject of inquiry' (*R v Rand* (1866) LR 1 QB 230 at p 232, per Blackburn J). However, the rule has been extended beyond direct pecuniary interest. As observed by Lord Widgery CJ in *R v Altrincham Justices, ex p Pennington* [1975] QB 549 at p 552:

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> There is no better known rule of natural justice than the one that a man shall not be a judge in his own cause. In its simplest form, this mean that a man shall not judge an issue in which he has a direct pecuniary interest, but the rule has been extended far beyond such crude examples and now covers cases in which the judge has such
D an interest in the parties or the matters in dispute as to make it difficult for him to approach the trial with the impartiality and detachment, which the judicial function requires.

[30] The breadth of the requisite 'interest' falling within the first category
E was exemplified in *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119. In that case, Lord Hoffman was the chairperson of Amnesty International Charity Ltd (AICL), which is closely related to Amnesty International. Amnesty International was an intervener in the case and advocated for the position that Senator Pinochet was not entitled
F to immunity. It was held that AICL's non-pecuniary interest in the matter was sufficient to automatically disqualify Lord Hoffman, and render the House of Lords decision in which he was a panel member invalid. Lord Brown-Wilkinson extended the scope of the first category to include non-pecuniary interests, by reference to the underlying rationale (at p 135):

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> ... although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause ... if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the
H rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties.

[31] Adopting the wide approach in *Pinochet (No 2)*, it may be argued that
I a panel member who stands to receive a benefit, in the form of a career advancement, has a non-pecuniary interest in the outcome of the case. The judge is then automatically disqualified from hearing the case by virtue of that interest alone, without the need to consider whether there was any likelihood of bias.

[32] It should be stressed that this disqualification does not depend on the judge personally holding any view or having any actual or apparent bias. As emphasised by Lord Hope (at 141): A

> It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of partiality. B

SECOND CATEGORY: REAL POSSIBILITY OF BIAS

[33] However, the approach in *Pinochet (No 2)* has been doubted as 'highly technical'. In view of subsequent developments to the test of real possibility of bias, it was suggested that the House of Lords in *Pinochet (No 2)* would be 'unlikely' to need to resort to the automatic disqualification rule if the new test were applied (*Meerabux v Attorney General of Belize* [2005] 2 AC 513 at para [22], Privy Council. We turn now to the test in the second category. C D

[34] The second category consists of cases in which the judge has an interest in the outcome of the proceedings, falling short of a direct pecuniary interest. Given that the interest may vary widely in nature and effect, each case must be considered on its own facts (*R v Gough* at pp 661–662). E

[35] The current test is as distilled by Lord Hope in *Porter v Magill* [2002] 2 AC 357 at [103]:

> The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. F

[36] The test is an objective one. The knowledge and disposition of the hypothetical observer were further explained in *Gillies v Secretary of State for Work and Pensions* [2006] 1 All ER 731; [2006] UKHL 2 at para [17]: G

> The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matter, not what is in the mind of the particular judge or tribunal member who is under scrutiny. It is to be assumed, as Kirby J put it in *Johnson v Johnson* [2000] 201 CLR, 488, 509, para 53, that the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at. It is to be assumed too that he is able to distinguish between what is relevant and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant. H I

[37] Public perception of the possibility of unconscious bias is the key (*Lawal v Northern Spirit Ltd* [2004] 1 All ER 187; [2003] ICR 856 at para [14] per Lord Steyn).

A **[38]** As an alternative to the automatic disqualification rule, the test in *Porter v Magill* may be used to determine whether the present case falls within the second category. It can be regarded as general public knowledge that the panel member had assumed the post of Chief Judge of Malaya immediately upon the former Chief Justice and former President of the Court of Appeal vacating B office. The timing of the appointment may well be regarded as a relevant fact to the hypothetical observer.

[39] It bears repeating that the public perception is that the early resignation of the second and third respondents is inextricably intertwined with this case. C As a consequence of their resignations, Justice Zaharah bt Ibrahim who is in the coram, has, since the last hearing, been appointed the Chief Judge of Malaya. Bearing in mind the overriding consideration of public confidence in the administration of justice, the impugned judge is placed in a position of conflict.

D **[40]** In this case, the factual context is critical. What underpins the principles in respect of bias and appearance of bias as they have developed, is the principle that justice should be apparent and transparent and that strenuous efforts must be taken to ensure that justice does not forfeit the E respect to which it is entitled.

[41] In this, this allegation as mounted by the attorney general's chambers that the impugned judge (Justice Zaharah bt Ibrahim) stands in a position of conflict should be seriously taken.

F **[42]** In *Metropolitan Properties Co (FGC) Ltd v Lannon and Others* [1968] 3 All ER 304, Lord Denning MR said that confidence is destroyed when right-minded people go away thinking that the judge was biased. While this statement related to the substantive decision in the case, it is equally relevant to G process. Public confidence is essential not only in respect of the court's decision, but also in respect of their processes. Thus, a problematic process which is flawed is as liable to damage public confidence as a flawed decision. The required conception of public confidence is arguably that of 'right-minded people'.

H **[43]** Even if the construct of 'right-minded people' is as elusive as the 'informed observer' — we need to be equally engaged with it and consider what would affect or damage that construct's confidence.

I **[44]** French CJ observed in *Cesan v R; Mas Rivadavia v R* (2008) 236 CLR 358 that there are elements of the judicial process which can be said, in a metaphorical sense, to have influenced the maintenance of public confidence in the courts, irrespective of their relationship to the actual outcome of the process.

[45] When one applies this to the instant case, the involvement of the impugned judge arguably raises a public perception problem. Right-minded people 'might go away thinking that the court was biased, not on account of the actual decision, but on account of *who* made the decision (the impugned judge)'. (Emphasis added.)

[46] Given the above, the *promise* of impartiality in the judiciary cannot build public faith in the courts; only *actual* impartiality can accomplish that goal. In this light, the position, taken by the applicants that they find no conflict vis a vis the appointment of the impugned judge sitting in this coram is disquieting to say the least. Our reasons are these. Both due process and natural justice guarantee an impartial court to protect a party's right to a fair hearing. Since that right belongs to the litigants (the applicants in this case), the litigants can waive it. But rules mandating a judge's removal for an appearance of bias do not protect the parties but instead serve to promote public confidence in judicial impartiality. In this, when a judge who possesses actual bias hears a case, the litigants sustain the injury. But when a judge suffers from only an appearance of bias, the injury is not to the parties but to the judicial system (*United States v Balistrieri* 779 F 2d 1191, 1204).

[47] In light of the above propositions, and to maintain public confidence in the administration of justice, Justice Zaharah bt Ibrahim graciously withdrew herself from the coram, leaving us with six members. The Rubicon having been crossed, we now come to the issue that falls to be decided.

THE CONSTITUTIONAL QUESTIONS RENDERED ACADEMIC

[48] The cluster of questions posed in this motion relate to points of law which, at the time they were raised, bristled with issues of public law importance. In *R v Secretary of State for the Home Department, ex p Salem* the court said at para (10) that: 'to send them away empty handed on an issue of such importance seemed to be not only churlish but also in breach of the overriding objective which illuminates all civil practice today'. In the same vein, the general view seems to be that there is no rule of law or practice that the court would not proceed with an appeal because of a change in circumstance as a result of which the issues between the parties were no longer of general public importance' (see The UK White Book 9A-77 section 19).

[49] But what of the general rule ?

The general principle is that the court does not answer academic questions. The leading case is *Sun Life Assurance of Canada v Jervis* [1944] AC 111 at pp 113–114, per Viscount Simon LC:

A The difficulty is that the terms thus put on the appellant by the Court of Appeal are such as make it a matter of complete indifference to the respondents whether the appellant wins or loses; the respondent will be in exactly the same position in either case. He has nothing to fight for, because he has already got everything that he can possibly get, however the appeal turns out, and cannot be deprived of it. I do not B think that it would be a proper exercise of the authority which this House posses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the Respondent in any way. If the House undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the C appellant hopes to get decided in its favour without any way affecting the position between the parties.

[50] In *Ainsbury v Millington* [1987] 1 All ER 929 at pp 930–931, Lord Bridge of Harwich similarly held:

D In this instant case neither party can have any interest at all in the outcome of the appeal. Their joint tenancy of property which was the subject matter of the dispute no longer exists. Thus, even if the House thought that the Judge and the Court of Appeal had been wrong to decline jurisdiction, there would be no order which could now be made to give effect to that view. It has always been a fundamental E feature of our Judicial System that the court decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no disputes to be resolved. Different considerations may arise in relation to what are collect 'friendly actions' and conceivably in relation to proceedings instituted specifically as a test case. The instant case does not fall within either of those F categories. Again litigation may sometimes be properly continued for the sole purpose of resolving an issue as to costs when all other matters in dispute have been resolved.

[51] The position is well established in Malaysia (see for instance *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah* G *Foundation & Ors and another appeal* [1998] 2 MLJ 137). The meaning of 'academic' was explained in *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113 at para [9], per Augustine Paul FCJ:

H The test therefore, in deciding whether an appeal has become academic is to determine whether there is in existence a matter in actual controversy between the parties which will affect them in some way. If the answer to the question is in the affirmative the appeal cannot be said to have become academic.

I **[52]** The general position applies equally to constitutional questions. In *Bhewa and Another v Government of Mauritius and Another* [1992] Lexis Citation 3959, the Privy Council declined to determine a question concerning the constitutionality of a statute in Mauritius. The question was rendered academic, for the effect of the impugned act had subsequently been reversed by

another act. In light of the new act, which was brought to the attention of the Privy Council on the day of the hearing, the appellant's counsel 'did not feel in a position to present any substantive argument in support of the appeal'. In the circumstances, the Privy Council considered that 'it would not be appropriate to make any order in the appeal either as to its disposed or as to costs'.

[53] The question before us is this. In view of the fundamental changes in the governance of the judiciary with the departure of the second and third respondents, the stark issues as housed in the questions posed have now become blunted by consequential events.

[54] It bears repeating that the illegality alleged has been superseded by subsequent events. As such, the subject matter of the dispute — the constitutionality of the judges holding their respective offices (second and third respondent) is no longer in existence. Their replacements have been made. What then is the dispute that needs to be resolved?

[55] The outcome of the constitutional reference will not affect the positions of the parties at all. No order can be made to give effect to the issue. In other words, there is now no remedy that this court can order, to give effect to the applicant's view on the constitutionality of the appointments.

[56] The applicants, the amicus curiae and the interveners contended that the questions raised in the case need to be answered, for they are not moot, that they are 'live' issues and that therefore they necessitate a judgment from this court.

[57] Although it is not unusual for the court to hear cases which may have become academic or hypothetical, this discretion is to be exercised sparingly.

[58] The authorities indicate that in such a case, the court has a narrow discretion to proceed, for it is to be exercised with caution.

PUBLIC LAW EXCEPTION

[59] One limited exception to the general rule is in relation to questions of public law. In *R v Secretary of State for the Home Department, ex p Salem* [1999] AC 450 at p 456, Lord Slynn of Hadley held:

> ... in a cause where there is an issue involving a public authority as to a question of public law, their Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which directly affect the rights and obligations of the parties inter se. However the discretion to hear disputes must be exercised with caution, and academic appeals should not be heard 'in the public interest for doing so.

A **[60]** By way of example, features of academic cases suitable for determination include: (a) discrete point of statutory construction; (b) a situation where it does not involve detailed considerations of fact; and (c) a situation where there is a large number of similar cases which need to be resolved.

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[61] This case clearly does not appear to fall within the *Salem* exception for public law matters.

C **[62]** In this case, as in *Salem*, 'the factors are by no means straightforward and in other cases the problem of when a determination is made may depend on the precise factual context of each case'. The factual matrix of the case was novel; no other similar controversy has arisen before or since. Following *Bhewa*, especially if counsel chooses not to advance any submissions in light of the subsequent development, it would not be appropriate for the court to make a D determination on the questions posed.

[63] We agree with the attorney general chambers that the issues in the motion are academic and that a judgment need not be issued by this court. We E reiterate the view that it is not the function of the courts to decide hypothetical questions which do not impact on the parties before them. This point was well put by the Lord Justice Clerk (Thomson) in *Macnaughton v Macnaughton's Trustees* 1953 SC 387 at p 392:

> F Our courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide *only live*, *practical questions,* and *that they have no concern with hypothetical, premature or academic questions*, nor *do they exists to advise litigants as to the policy which they should adopt in the ordering of their affairs. The courts are neither a debating club nor an advisory bureau*. Just what is a live *practical question is not always easy to decide and must, in the long run, turn on the* G *circumstances of the particular case*. (Emphasis added.)

[64] The above view was endorsed by Lord Scott of Froscoe in *Regina (Rusbridger and another) v Attorney General* [2004] 1 AC 357, who said that 'the valuable time of the courts should be spent on *real* issues'. The court does H not act in vacuo nor does it act in vain. Shorn of the legal rhetoric, the fundamental purpose of the application was to ensure that the second and third respondents whose appointment have been alleged to be unconstitutional was to be removed from the position, or for them to vacate their position with immediate effect.

I

[65] The legal construction of the question posed was specially in that factual context. But as mentioned before both second an third respondent have *since relinquished their post. And since matters have changed irrevocably by reason of their resignation*, it is no longer tenable for the court to answer the question

posed because the factual substratum underlying the question posed no longer exists. Therefore the court would effectively be acting in a vacuum.

[66] In fact in such a situation as this, where there is no more a live issue and where the *Salem* exceptions do not apply, the position taken by the applicants, the intervener and amicus curiae is called into question.

[67] In this, we decline to issue a judgment for there is no issue to be decided by us. The second and third respondents have left their positions. The applicants have nothing to fight for, because they have already achieved their purpose.

[68] In this too, we echo the sentiment expressed by the House of Lords in *Ainsbury v Millington* that it is the duty of counsel and solicitors in any pending appeal in publicly funded litigation (although this is not strictly publicly funded), that whenever an event occurs which arguably disposes of the lis, either to ensure that the appeal is withdrawn by consent or, if there is no agreement to that cause, to bring the facts promptly to the attention of the court, to seek directions. In this, the applicants did nothing of the sort.

[69] In this connection, 'this court has inherent power to control its own process and it is entitled to bring arguments to a close when it is clear that nothing of value will be lost, by ending it' (*HM Attorney General v Scriven* [2000] Lexis Citation 5132).

CONCLUSION

[70] For the reasons given, we accordingly dismiss these references. Since this is a matter of public interest, there will be no order as to costs, here and in the court below.

References dismissed.

Reported by Nabilah Syahida Abdullah Salleh